No. 12718

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM EWALD ANDERSON,
Appellant,

vs.

JOHN P. BOYD, District Director,
Immigration and Naturalization,
for the Seattle District,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

APPELLEE'S BRIEF

J. CHARLES DENNIS
United States Attorney
JOHN E. BELCHER
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OFFICE AND POST OFFICE ADDRESS:
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PRELIMINARY STATEMENT

This is an appeal from an order and judgment of the District Court for the Western District of Washington, Northern Division denying a writ of habeas corpus in a deportation proceeding, entered on the 27th day of July, 1950 (R. 32).

Notice of appeal was filed and served September 18, 1950 (R. 33) and cost bond on appeal with General Casualty Company of America, as surety, was filed the same day.

Appellant has correctly set forth the statutes giving the District Court jurisdiction to hear and determine the issues as well as this court's jurisdiction of the appeal.

STATEMENT OF THE CASE

Appellant has fully covered this phase in his opening brief, and we have nothing further to add.

POINTS ON APPEAL

Save and except the points covering what the court found as facts in its written findings, conclusions and judgment, the other points refer to the court's three oral decisions which have no particular bearing on the case except to more fully explain the written findings of fact, conclusions of law and judgment.

It would seem that the only matters to be reviewed on this appeal are:

(a) Whether the court erred in denying the appellant's application for a writ of habeas corpus.

(b) Whether the Administrative Procedure

Act is applicable to proceedings had prior to the effective date of that Act.

(c) The effect of the decision by the United States Supreme Court, in the Wong Yang Sung case on the proceedings in this case.

(d) The effect of this court's decision in the Yanish case on the proceedings here.

THE EVIDENCE

The evidence on behalf of appellant on whom the burden rested to show that the decision of the Board of Immigration Appeals was erroneous and that appellant was not accorded a fair hearing did not measure up to that required in a habeas corpus proceeding. In support of the application for the writ appellant testified (R. 40-72), but there is not one syllable of testimony bearing on or from which it could possibly be inferred that appellant was denied any right to which he was entitled, in fact he was at all times represented by capable and competent counsel, as the record so clearly shows (R. 75).

In support of his return and answer to the order to show cause and application (R. 7) appellee in paragraph IV of the answer alleged:

> "Answering paragraph IV of the petition the respondent avers that at the hearings held by the Immigration authorities the foregoing facts

detailed herein affirmatively appeared, and that it further appeared that the petitioner was a member of the Communist Party. The respondent avers that it further appeared affirmatively from the records and files herein that the hearings were conducted in accordance with the law as applied to such matters and that in ordering the petitioner deported the Immigration officials have not abused their discretion.

The respondent further avers that the finding of the Immigration authorities that the petitioner was a communist or a member of the Communist Party is based upon reasonable evidence or fact, and that the testimony and exhibits at said hearing corroborate the fact that the petitioner was a member of the Communist Party, and that under the rules of evidence as set forth in the Rules of Evidence in the United States Courts in such cases there is substantial evidence in support thereof. The respondent admits that the petitioner is American-born and avers that under the laws of the United States and the decisions of the courts of the United States said order of deportation is made after a proper and lawful hearing and that the ground that the petitioner was a communist is not based upon suspicion or conjecture, and that the Immigration Officers in ordering petitioner deported have not abused their discretion, and that the petitioner has had a fair trial." (R. 9-10).

In support of this answer the appellee attached to and made a part of his answer and return to the order to show cause the several files of the Immigration Service, duly certified and containing the entire record of the proceedings had by the Immigration Service (R. 12 — par. V of return).

This voluminous record was carefully read and considered by the trial judge (R. 17-97) and on November 4, 1949, the court orally announced its decision denying the writ. The court there said that at a later date "some of the reasons which appealed to the court as supporting such decision would be stated" (R. 17).

The court further stated orally on June 22, 1950 that on December 4, 1949, the court rendered its oral decision. In that oral decision of June 22, 1950 the court further said:

> "After findings of fact, conclusions of law and decree were presented for entry and while the court was considering certain proposed changes as to the findings of fact, the petitioner on March 17, 1950 and after the decision of February 20, 1950, of the United States Supreme Court in *Wong Yang Sung v. McGrath*, 339 U. S. 33, filed a motion asking the court for a reconsideration of the entire record and for the granting of the writ of habeas corpus notwithstanding such oral decision of the court.
>
> Respective counsel were accorded full opportunity to and did argue every phase of the entire matter from the inception as they desired.
>
> While counsel for petitioner in connection with such motion filed March 17, 1950, strongly insisted that the Administrative Procedure Act of June 11, 1946, 5 U.S.C.A., Sec. 1001, et seq., had not been complied with as to petitioner and urged that under such act petitioner was entitled to the writ prayed for it should be noted that never prior to March 17, 1950, had peti-

tioner in any way argued or even indicated that said act was in the slightest degree or at all applicable to the proceedings involving him.

This court notwithstanding the lateness of petitioner's suggestion again carefully examined the entire record, files, exhibits and evidence with respect to whether or not the Administrative Procedure Act related thereto in whole, as claimed by petitioner, or at all.

After such careful consideration and reexamination of every aspect of the matter the court is still of the opinion that the previously announced denial was correct.

Petitioner since such tardy suggestion has argued that all of the many hearings held between 1939 and 1945 before the Administrative Procedure Act was ever enacted, as well as long before any effective date of that act, which as to the appointment of examiners was June 11, 1947, Section 1011 should be set aside because not in compliance with an Act that did not then exist.

Plainly the Act does not apply to the hearings had before its enactment.

No hearings were had after it was passed. And it does not appear that the petitioner would have had any rights under the Act as to anything since its enactment that he was not afforded. But even if he would have been entitled to some technical right under the Act after its enactment had he or his counsel timely asked the Immigration authorities for such, he should not now be able to successfully complain.

To approve the position of counsel for petitioner beginning in March, 1950 would establish a precedent hazardous in the extreme.

This Administrative Procedure Act because of

the subsequent time of its enactment, because of the subsequent effective date therein stated, and because of the specific language of the Act, did not apply to the proceedings before the Immigration authorities as to this petitioner. Aside from that petitioner represented all the while by experienced counsel, waived any right to object to the procedure followed.

I can find no basis, either legally or equitably, for the issuance of the writ of habeas corpus sought. Every sentimental ground for granting relief to him is based upon an occurrence happening after the Immigration authorities had declared their opposition to his reentry into the United States and would be a solicitation to others to insincerely copy his course as a helpful strategy.

For the reasons, among others, orally stated by me on December 14, 1949, I am satisfied and find that the Immigration Authorities were acting within the scope of their powers, that they were neither arbitrary or capricious nor acting in abuse of their discretion, and that the evidence presented to them was ample to justify the conclusion they reached.

Moreover, based on the record and under the law, I am further satisfied and further find that their actions, findings and conclusions were not contrary to the law or the Constitution; that they were supported by substantial evidence and moreover were supported by the facts to the extent that the facts were or are subject to trial de novo by any reviewing court. And finally I find that there was no prejudicial error.

If there were any errors on the part of the Immigration authorities, such favored petitioner and in no wise constituted prejudicial error. It must be remembered that he wilfully and unlaw-

fully entered the United States early in 1940 and that he is still here and at liberty in spite of the efforts of the Immigration authorities to return him to the country from whence he unlawfully came so many years ago.

His conviction for wilful illegal entry established beyond all reasonable doubt that his entry then was wilful and illegal. Such is res judicata between the government and the petitioner. Having come to this country wilfully and unlawfully over ten years ago he has therefore never since had a lawful right to remain here. I have no legal or conscientious ground to interfere with the decision of the Immigration authorities that he should be deported. Neither the recent Supreme Court decision of *Wong Yang Sung v. McGrath*, 339 U.S. 33, supra, and 339 U.S. 908 per curiam modification, nor the per curiam decision of April 24, 1950, in the cause of *Yanish, et all v. Barber, etc.* (9 Cir.) 181 F (2d), 492, apply to petitioner's situation under the record here involved.

The distinctions between them and the instant case are definite and clear. In each of them, contrasted with the situation here, the hearings before the Immigration authorities in question were long after the effective date of the Administration Procedure Act. In each of them contrasted with the situation here, the one sought to be deported made timely and appropriate demand for compliance with the Act. See *Wong Yang Sung* case, 80 F. Supp. 235 and 174 F. (2d) 158, and Judge Harris' opinion in the Yanish case, 81 F. Supp. 499 and 86 F. Supp. 461 (Yanish case — Judge Erskine) for matters preceding the decision of Judge Harris. And in each of them contrasted with the situation here, there was apparently a lawful entry.

Such motion is overruled and such petition of William Ewald Anderson is, of course, again denied.

The foregoing transcript of oral opinion herein of June 22, 1950, is approved June 23, 1950.

LLOYD L. BLACK,
U. S. District Judge."

(R 17-21)

ARGUMENT IN ANSWER TO APPELLANT

We might well stop here and submit this filed oral opinion of the late Judge Black as our argument in support of the judgment but are prompted to go further in view of the action of the Congress in taking note of the decision of the United States Supreme Court in the Wong Yang Sung cases, supra.

In the *Supplemental Appropriation Act 1951* (U.S. Code Congressional Service No. 10, 81st Congress 2d Session) we find this at p. 3798: Public Law 843:

"*General Provisions — Department of Justice*

Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act (5 U.S.C. 1004, 1006, 1007)."

The sections which the Congress mentions deal with the subjects of adjudications, hearings and the manner in which they shall be conducted, burden of

proof, evidence, record and basis for decision, initial decisions, conclusiveness, review, etc.

Prior to the Supreme Court's decision in the *Wong Yang Sung case*, supra, the District Courts and the Circuit Courts of Appeal in many of the Circuits had held that deportation proceedings were excepted from operation of Section 1006 of the Administrative Procedure Act.

Azzollini v. Watkins (2d Cir.) 172 F. (2d) 897.

In re U. S. ex rel Obum, 82 F. Supp. 36 affirmed 170 F. (2d) 1009;

Wong Yang Sung v. Clark, 80 F. Supp. 235, affirmed 174 F. (2d) 158, subsequently reversed in 339 U. S. 33 and now reinstated by Congress in the Supplemental Appropriation Act 1951, Public Law 843, 81st Congress, 2d Session.

The hearings had before the Immigration Service were as follows, as shown by the original record, sent to this court for the purposes of this appeal:

1. First hearing before Board of Special Inquiry at Vancouver, B. C., August 8, 1939.

2. An appeal from the order of exclusion was taken by appellant.

3. While that appeal was pending and before decision was made, appellant on January 3, 1940 unlawfully returned to this country from Canada

on foot, entering near Blaine, Washington, at a place other than that designated for entry and without reporting to the Immigration authorities.

4. Appellant was tried in the District Court for this unlawful entry, before a jury and convicted, being cause No. 45571, and was by the Court sentenced to 11 months in the King County Jail and fined $500.00.

5. Appellant gave notice of appeal to this court, which was subsequently voluntarily dismissed.

6. On January 22, 1940 a warrant of deportation was issued, which was served on appellant February 19, 1940, and appellant was released on a $500.00 bond the same day.

7. On January 22 and March 27, 1940 appellant, being represented by counsel was accorded a hearing under the warrant of arrest. The record of these hearings was forwarded to the Commissioner of Immigration and Naturalization for review and decision by the Board of Immigration Appeals.

8. On September 16, 1942, the Board of Immigration appeals rendered its decision ordering the case re-opened to permit appellant to file an application for suspension of deportation or for voluntary departure in lieu of deportation, the government to

be heard in the introduction of evidence to sustain the government's claim that appellant was a member of a class enumerated in Section 19(d) of the Act of 1917 as amended (8 U.S.C. 155) and that petitioner (appellant) be afforded full opportunity to meet and rebut such evidence. The order further providing that if the additional evidence warranted additional charges should be lodged.

9. Hearings were had October 7, 1942, November 24 and 27, 1942, December 9 and 10, 1943, July 6, 1944, and May 1, 1945. At all of these hearings appellant was represented by counsel of his own choice.

10. The entire record of these several hearings was forwarded to the Central Office, Washington, D. C. for review together with the presiding Inspector's proposed findings of fact and conclusions of law on May 9, 1945, which included petitioner's (appellant's) brief prepared by counsel of his own choice.

11. On January 5, 1948, the Board of Immigration Appeals entered its decision and ordered petitioner deported to Canada, and a warrant of deportation was issued.

12. On March 12, 1948, appellant, through his present counsel, made application for stay of deportation on the ground that petitioner's physical condi-

tion was such as would result in the impairment of his health, which request was transmitted to the Commissioner at Philadelphia who denied the request.

13. On May 17, 1948, appellant requested a reopening of the proceedings to permit him to present additional evidence to show he had adopted two minor children of his present wife, and that his deportation would result in serious economic detriment to them. This request was denied.

As will be readily seen from the foregoing, all of which is contained in the original certified record of the proceeding before the Immigration and Naturalization Service, now on file in this court pursuant to stipulation (R 37) for the transfer of exhibits to this court, no hearing or hearings on the merits, at which any evidence was taken was had after the effective date of the Admintstrative Procedure Act. All of the evidence was concluded more than a year prior to June 11, 1947, the effective date of the Examiner provisions of the Administrative Procedure Act (Title 5, Sec. 1006, U.S.C.), but the final decision of the Board of Immigration Appeals was not rendered for six months thereafter on, to-wit: January 5, 1948.

There is nothing in the Act itself which even indicates a Congressional intent to make it retroac-

tive. And the Act applies *only* to the conduct of the actual hearing before the administrative body, in other words, to the taking of evidence at most, and not to the review of that evidence by the Board of Immigration Appeals. Nor is there anything in the decision of the United States Supreme Court in the *Wong Yang Sung case*, supra, as we see it, that militates against this view.

The Administrative Act itself (Section 1011, Title 5, U.S.C.) provides in part:

> " * * * and no procedural requirement as to any agency proceeding initiated prior to the effective date of such requirement."

ANSWER TO APPELLANT'S ARGUMENT

Counsel for appellant first argues (Br. p. 22) that the court abused its discretion in not permitting oral argument on November 4, 1949.

It was on July 19, 1949, after the first hearing upon the application for the writ of habeas corpus, that the court stated that the hearing was recessed, subject to call, and that he was going to call counsel in for the purpose, among others, of "asking at least *argument on those phases that I feel I need help upon.*"

Apparently the court felt that because all ques-

tions in the case had been thoroughly discussed and the position of both parties having been made clear to him through the several written "memoranda" filed with him, he did not need further assistance, and that he had satisfied himself on all phases of the case from the records and briefs before him. This was discretionary, and the court did not err.

Counsel lays stress upon the fact that the opinion of the Board of Immigration Appeals rendered January 5, 1948 was based upon the ex parte statements given by the witnesses Deskin, Clark and Vekich and upon appellant's testimony given before the American Consul at Vancouver, B. C.

The Board of Immigration Appeals, as appears in Part II of the certified Immigration file, on September 18, 1942 had this to say:

> "The Board of Special Inquiry developed the Act of 1918 charges through the introduction of three ex parte statements of three individuals who, it is alleged are rivals of this alien in labor affairs of the Pacific Northwest. The alien was not confronted with these individuals, and apparently his only means of rebutting the contents of their statements was by his repeated assertion that he was not a Communist and never had been.
>
> *The procedure of a Board of Special Inquiry does not permit the alien's representation by counsel nor the right of confrontation of witnesses.* Thus it is not a wholly adequate pro-

cedure to determine such a disputed factual issue as is presented in this case."

It was for this reason that the Board sent the matter back to the Director for the purpose of having these witnesses brought before the Board of Special Inquiry in the *deportation proceedings*, as distinguished from the *exclusion hearings*, wherein appellant was entitled to the confrontation of witnesses, representation by counsel of his own choosing, and the right of cross-examination.

Counsel has correctly quoted from the testimony of the witness Deskins. There were other witnesses, to-wit: Shanley, Davenport, Gillespie, Penning and Laut, whom we believe the record will show, testified to facts which justified the Board of Special Inquiry to find appellant was a member of the Communist Party, and the further evidence as to what the Communist Party stands for, which justified the Board of Immigration Appeals in affirming the findings of the Board of Special Inquiry on that phase of the deportation cases, wherein, in ordering appellant's deportation, it said:

"The last remaining question in connection with the second lodged charge is whether there was substantial evidence before the board of special inquiry upon the basis of which it was warranted in concluding that respondent was a member of the Communist Party of America, and that the Communist Party of America advocated

and distributed literature advocating the overthrow of the government by force or violence. See *Matter of Miguez*, 5609/547 (October 1, 1943); *Matter of Soto Quintana*, 6388210 (Jan. 13, 1947); cf *Doskaloff v. Zurbrick*, 103 F. (2d) 579 (C.C.A. 6, 1939). Hence, so far as the second lodged charge is concerned, we are limited in our review to the evidence taken by the board of special inquiry at Vancouver at the hearings beginning on August 9, 1942 and terminating on September 6, 1942, and only that evidence. We shall not set forth the voluminous evidence developed by the board of Special Inquiry on these issues.

We simply point out that the statements of the witnesses Deskins (Ex. H of Ex. D), Clark (Ex. F of Ex. D) and Cekish (Ex. G of Ex. D) together with respondent's statements before the American Consul at Vancouver, B. C. (Ex. B and C of Ex. D) contain sufficient evidence to support the conclusion reached by the board of special inquiry that respondent was a member of the Communist Party of America.

Again the board of special inquiry was warranted in finding, on the basis of Exhibits L and P, that the Communist Party of America was an organization that advocated and distributed literature advocating the overthrow of the American Government by force and violence. The second lodged charge is therefore sustained."

Counsel for appellant cites this decision in his brief and italicizes certain portions thereof. The criticism made by him in connection with the Board's previously announced decision in the *exclusion proceedings* is not justified.

The hearings held on the warrant of arrest, it will be remembered, were in the *deportation proceedings* and the remarks made by the reviewing board in its decision in the *exclusion proceedings* to the effect that ex parte affidavits were "not wholly adequate * * * to determine such a disputed factual issue as is presented in this case" was the reason that oral evidence of the several witnesses in the *deportation hearings* was taken, and at which hearings appellant was at all times represented by competent counsel of his own choice, and such counsel exercised their right of cross-examination, a privilege not granted in exclusion proceedings.

The District Court went to great length in its careful and painstaking analysis of both rulings by the reviewing board.

In habeas corpus the District Court is limited to the determination of whether from the record it is made to appear that the applicant for such writ was accorded a fair hearing, and as to whether or not, upon the record, it is made to appear that the administrative body abused its discretion or acted arbitrarily and capriciously. The trial court, in habeas corpus, cannot substitute its judgment for that of the administrative body. All it can do is make the determinations we have mentioned.

So far as the evidence of appellant's membership in the Communist Party is concerned, there was, as the administrative reviewing board found, sufficient evidence of that fact. It also found that the evidence before the department was amply sufficient to sustain the finding that the Communist Party of America had for its objects and purposes the overthrow of the American Government by force and violence.

In this latter finding the board has since been supported, after a long series of hearings conducted by both the United States Senate and House of Representatives in the preamble to Public Law 834, 81st Congress, 2d Session, passed over the President's veto, September 22, 1950 entitled "Internal Security Act of 1950," wherein inter alia it is said:

> "Sec. 2—As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds:
> * * *
>
> (15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined.
>
> Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straights, that the overthrow of the government of the United States by force and violence may seem possible of achievement, it seeks converts far

and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments.

The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, *present a clear and present danger to the United States* and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each state a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

It is not true, as argued by appellant, that speaking of the decision of the Board of Immigration Appeals that their whole opinion is based upon the 1939 ex parte statements which were discorded in 1942 by the board itself. The fact is, as we have previously pointed out, these affidavits were considered as supplemented by oral testimony in the *deportation hearing* by several other witnesses, whose testimony appellant has not seen fit to discuss. Neither is the decision based upon suspicion, as counsel is pleased to call it, nothwithstanding the fact that the board of Immigration Appeals and the District Court characterized the evidence as substantial.

The Kettunen case, 79 F. (2d) 315, cited by appellant was determined under an entirely different state of facts. In that case it was a question of "affiliation" while here the proof was "membership."

Appellant in this case has not been persecuted, as stated by counsel. The difficulties in which he finds himself are his own making. He has successfully avoided deportation to Canada for nearly nine years by various applications for relief on varying grounds, and by the employment of several different attorneys having varied views and expressing their opinions of what the law on the subject should be without denying what we assert the law on the subject actually is.

Appellant insists that the provisions of the Administrative Procedure Act are applicable to his case. What we have heretofore said on that subject, it would seem, is a complete answer to that proposition.

It is said, however, that on March 12, 1948 appellant made application for stay of deportation, which was denied. Counsel does not point out any provision of the Administrative Procedure Act which would entitle his client to the relief he sought at that time, nor did counsel at that time make any claim to the benefit of the procedures set out therein.

Appellant quotes from this Court's per curiam opinion in the case of *Yanish v. Barber*, 181 F. (2d)

492, as well as the regulations of the Department, but fails to mention that subsequent to that decision the Immigration Service did promulgate amended rules and regulations on August 3, 1950 (15 FR 6169-70), and again October 10, 1950 (15 FR 7366). The Yanish case, we understand, is now pending before this court on review from the California District Court because of the adoption of these new rules and regulations, and seeking clarification.

ARGUMENT IN SUPPORT OF JUDGMENT

The warrant of deportation issued on the 5th of January, 1948, commands that the appellant "who entered the United States at Blaine, Washington, on the 3rd of January, 1940, is subject to deportation under the following provisions of the laws of the United States, to-wit: The Immigration Act of 1917, in that he entered without inspection; the Act of February 5, 1917, as amended, in that he entered the United States within one year from the date of exclusion and deportation, consent to reapply for admission not having been granted by the proper authority; the Immigration Act of May 26, 1924, in that, at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and the Act of

October 16, 1918, as amended, in that he returned to or entered the United States, after having been excluded and deported, or arrested and deported in pursuance of the provisions of said Act which relate to anarchists and similar classes" be deported to Canada.

Section 3 of the Immigration Act of 1924, as amended (8 U.S.C. 203) provides:

> "When used in this Act the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except (1) an accredited official of a foreign government recognized by the Government of the United States, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in pursuit of his calling. as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade between the United States and the foreign state of which he is a national under and in pursuance of the provisions of a treaty of commerce and navigation, and his wife, and his unmarried children under twenty-one years of age, if accompanying or following to join him, and (7) a representative of a foreign government in or to an international organization entitled to

enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act, or an alien officer or employee or such an international organization, and the family, attendants, servants, and employees of such a representative, officer, or employee. (43 Stat. 154; 47 Stat. 607; 54 Stat. 711; 8 U.S.C. 203; Sec. 7 (c) Public Law 291, 79th Congress; Chapter 652, 1st Session; approved December 29, 1945)."

Section 13(a) of the Immigration Act of 1924 (8 U.S.C. 213 (a)), provides as follows:

"*No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa* or was born subsequent to the issuance of the immigration visa of the accompanying parent; (2) is of the nationality specified in the visa in the immigration visa; (3) is a non-quota immigrant if specified in the visa in the immigration visa as such; (4) is a preference-quota immigrant if specified as such; and (5) is otherwise admissible under the immigration laws." (Italics ours).

Section 14 of the Immigration Act of 1924 (8 U.S.C. 214) provides in part as follows:

"Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917: * * * ".

Section 3 of the Act of October 16, 1918, provided as follows:

> "*That any alien who shall, after he has been excluded and deported* or arrested and deported in pursuance of the provisions of this Act, *thereafter return to or enter the United States* or attempt to return to or to enter the United Sates shall be deemed guilt of a felony, and upon conviction thereof shall be punished by imprisonment for a term of not more than five years; and shall, upon the termination of such imprisonment, *be taken into custody, upon the warrant of the Attorney General, and deported in the manner provided in the immigration Act of February fifth, Nineteen Hundred and Seventeen.* (40 Stat. 1012-1013; 8 U.S.C. 137)" (Italics ours).

Section 19(a) of the Act of February 5, 1917 (8 U.S.C. 155) provides in part as follows:

> " * * * at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner of Immigration and Naturalization, or at any time not designated by immigration and naturalization officials, or who enters without inspection, shall upon the warrant of the Attorney General be taken into custody and deported: * * *"

In rendering its decision of September 18, 1942, the Board of Immigration Appeals in directing the

reopening of the deportation proceedings commented in part as follows:

> "The Immigration history of this man commences with his exclusion by a Board of Special Inquiry at Blaine, Washington, on January 3, 1939. The grounds for exclusion were that he was an immigrant not in possession of an immigration visa, that he was a person likely to become a public charge, and one who admits committing a crime involving moral turpitude, to-wit: adultery. He appealed and the excluding decision was affirmed solely on the ground that he was an immigrant not in possession of an immigration visa. He was granted permission to reapply for admission when in possession of an immigration visa, this aspect of the order upon appeal having been dictated in light of the Supreme Court's decision in *Hansen v. Haff*, 291 U. S. 559. We note parenthetically that since that time the subject has been divorced by his first wife and has entered into a valid marriage with the woman with whom he was living in Aberdeen, Washington on July 19, 1939 (Gov't. Exhibit (c) p. 3). There can be no doubt of this man's alienage in the light of his testimony that he was naturalized in Canada in 1926 (p. 2 of Exhibit C and see Exhibit V). The attorney argues in his brief that if Anderson never acquired legal citizenship in Canada because of misrepresentations as to his residence immediately prior to his Canadian naturalization, or if he has lost Canadian citizenship through failure to maintain his domicile there, then he is still or becomes a subject of the United States and is not deportable. This overlooks the fact, however, that the Canadian naturalization or at least the taking of the oath of naturalization, under the Act of 1907, resulted in a loss of American nationality and that regardless of his Canadian

status (Canadian consent to his acceptance as a deportee has been obtained) he is an alien for the purpose of our immigration laws.

Following this initial exclusion the alien was issued an immigration visa at Vancouver, B. C., on August 8, 1939. He immediately appeared before a Board of Special Inquiry at Vancouver and after a series of hearings which concluded on September 6, 1939, he was excluded under the Act of October 6, 1918, as amended by the Act of June 5, 1920, as a member of the Communist Party. He appealed from this excluding decision. Consideration of the appeal was delayed, partly at the request of the alien's counsel, and the matter was pending before this Board when the alien entered on January 3, 1940, without inspection. He immediately surrendered himself to the immigration authorities who took his statement and made application for a warrant of arrest on the ground that he entered without inspection and that he is a member of and affilliated with a body prescribed under the Act of 1918, as amended. The warrant issued however, on the charges that under the Act of 1917 he entered without inspection and the Act of 1917, as amended by the Act of March 4, 1929, in that he entered within one year from the date of exclusion and deportation, consent to reapply for admission not having been granted. The case is now before us following warrant hearings. The attorney in his brief argues that because of prejudice exhibited by the immigration authorities at Vancouver this alien was unlawfully excluded and therefore was entitled to effect his entry following the issuance to him of an immigration visa in the manner he did. The attorney also urges that the appeal of the alien from the excluding decision of the Board of Special Inquiry should be upheld and he will then be ad-

missible nunc pro tunc as of the time he entered. These two contentions are untenable. The logical enforcement of the immigration laws with respect to exclusions requires literal enforcement of the exclusion notice which was delivered to this alien by the Chairman of the Board of Special Inquiry in Vancouver as follows: You are excluded from admission to the United States for a period of one year, unless admitted by our Central Office on appeal, unless permission to reapply for admission is granted you by the Secretary of Labor. Application for such permission should be forwarded to the Secretary through this office" (p. 19 of B.S.I. of Aug. 9, 1939). It has never been contended that an appeal from an excluding decision operates as a supersedeas either immediately or retroactively in the event the appeal is sustained. And obviously also it cannot be maintained that the officers of the Immigration and Naturalization Service who constituted the Board of Special Inquiry acted illegally and that therefore the alien is entitled to disregard their excluding decision, at least in the absence of definite and positive proof that the Board was illegally constituted by reason of disqualifying prejudice or otherwise. We note, also, that the alien is serving a prison sentence as a result of his commission of the crime of making an illegal entry. We therefore conclude that this alien is deportable upon the warrant charges. In view, however, of the disposition which we now make we do not at this time make the formal findings of fact and conclusions of law with respect to the charges contained in the warrant of arrest."

In ordering the appellant's deportation on the 8th of January, 1948, the Board of Immigration Appeals stated in part as follows:

"We considered the case on September 18, 1942. We agreed with the Presiding Inspector that respondent was subject to deportation on the warrant charges. However, because of the enactment of the Alien Registration Act since the institution of deportation proceedings, we reopened the hearing to permit respondent to apply for discretionary relief under Section 19(c) of the Act of February 5, 1917, as amended by the Alien Registration Act of 1940. We also directed that evidence be taken with respect to respondent's membership in the Communist Party of America and that, if the evidence warranted, an appropriate charge based upon the Act of October 16, 1918, as amended, be lodged against respondent. At the reopened hearing the two charges set forth above were lodged against respondent. At the conclusion of the reopened hearing the Presiding Inspector again recommended that respondent be deported.

We shall first briefly restate our reasons for upholding the charges contained in the warrant of arrest. There is no dispute that respondent deliberately evaded examination by the immigration authorities when he surreptitiously entered the United States on January 3, 1940. By returning to the United States in this manner, respondent entered without inspection within the meaning of the Act of February 5, 1917. Deportation proceedings were instituted within three years after that entry and, accordingly, respondent is subject to deportation on the first charge contained in the warrant of arrest.

We now turn to the second charge contained in the warrant. By illegally entering the United States on January 3, 1940, respondent abandoned the appeal taken by him in the exclusion proceedings. The excluding decision of the Board of Special Inquiry then became final. And, as

we shall show below when we discuss the validity of the second lodged charge, there was substantial evidence before the Board of Special Inquiry upon the basis of which it was warranted in excluding respondent from the United States. Accordingly, and since respondent admittedly had not received permission to reapply for admission to the United States following his exclusion by the Board of Special Inquiry, he is now subject to deportation on the second charge stated in the warrant.

The first charge lodged at the hearing is based on the fact that respondent had no immigration visa when he entered the United States on January 3, 1940. Respondent, as he admitted, then intended to remain permanently in this country and was therefore an immigrant. Under Section 13 of the Immigration Act of 1924 he was required to have such a document. In this connection we might say that the immigration visa which respondent presented to the Board of Special Inquiry in August, 1939, had already expired and in any event was not in his possession when he entered the United States in January, 1940. Furthermore, when the excluding decision of the Board of Special Inquiry became final, respondent was required to obtain a new consular document in order to thereafter enter the United States in compliance with the Immigration Act of 1924. We therefore conclude that respondent is subject to deportation on the first lodged charge.

The second lodged charge is based on Section 3 of the Act of October 16, 1918, as amended. This section provides in part for the deportation of any alien who returns to the United States after having been excluded and deported pursuant to the provisions of the Act of October 16, 1918. To support the second lodged charge the Gov-

ernment must establish that respondent prior to his last entry, was excluded and deported from the United States under the Act of October 16, 1918, as amended. As we said above the Board of Special Inquiry at Vancouver, B. C., excluded respondent on September 6, 1939, under Section 1 of the Act of October 16, 1918, as amended June 5, 1920, on the ground that he was a member of and affiliated with an organization that advocated the overthrow of the Government of the United States by force or violence and that distributed literature advocating such doctrines. The prescribed organization was found to be the Communist Party of America. Again, as we pointed out above, the excluding decision of the Board of Special Inquiry became final when respondent illegally entered the United States on January 3, 1940, thereby abandoning his appeal.

The last remaining question in connection with the second lodged charge is whether there was substantial evidence before the Board of Special Inquiry upon the basis of which it was warranted in concluding that respondent was a member of the Communist Party of America and that the Communist Party of America advocated and distributed literature advocating the overthrow of the Government by force or violence. See *Matter of Liquez*, 56019/547 (October 1, 1943; *Matter of Soto-Quintana*, 6388210 (January 13, 1947); cf. *Soskaloff v. Zurbrick*, 103 F. (2d) 570 (C.C.A. 6, 1939). Hence, so far as the second lodged charge is concerned, we are limited to our review to the evidence taken by the Board of Special Inquiry at Vancouver at the hearings beginning on August 9, 1942 and terminating on September 6, 1942 (should be August 9, 1939 and terminated on September 6, 1939), and only that evidence. We shall not set forth the volu-

minous evidence developed by the Board of Special Inquiry on these issues. We simply point out that the statements of the witnesses (Deskins (Ex. H of Ex D), Clark (Ex. F of Ex. D) and Vekisch (Ex. G of Ex. D)), together with respondent's statements before the American Consul at Vancouver (Exs. B and C of Ex. D) contain sufficient evidence to support the conclusion reached by the Board of Special Inquiry that respondent was a member of the Communist Party of America. Again, the Board of Special Inquiry was warranted in finding, on the basis of Exhibit L-P, that the Communist Party of America was an organization that advocated and distributed literature advocating the overthrow of the American Government by force or violence. The second lodged charge is therefore sustained."

In denying the appellant's request for suspension of deportation, the Board of Immigration Appeals stated in part:

"Section 19(d) of the Act of February 5, 1917, as amended, provides in part that aliens subject to deportation under the Act of October 16, 1918, as amended, are not eligible for suspension of deportation. We have found respondent subject to deportation under this Act. For that reason alone we cannot suspend his deportation. An order of deportation will be entered."

The Commissioner of Immigration and Naturalization in denying the petitioner's request for a stay of deportation dated the 12th of March, 1948, commented in part as follows:

"While there can be no question but that the

applicant is in need of medical attention, the record clearly indicates that such medical attention can be obtained in Canada, to which country the alien is presently able to travel without injury to his life or his health. Accordingly, the instant application for stay of deportation should be denied."

The Board of Immigration Appeals when denying the appellant's request for a reopening of his case on the 9th of June, 1948, stated in part as follows:

"While the motion is not properly supported as Section 90.11(b), Title 8, C.F.R., requires, we would not grant the motion even if the proper supporting documents were submitted. As we said in our original opinion, respondent is not eligible for suspension of deportation because of his deportability on one of the grounds set forth in Section 19(d) of the Act of February 5, 1917, as amended."

In the case of *Monji Uyemura v. Carr*, 99 F. (2d) 729 (C.C.A. 9), October 18, 1938, Circuit Judge Garrecht who delivered the opinion of the Court stated in part:

" * * * It is immaterial that, upon the evidence presented, we might not agree with the conclusion reached, for the law is well settled that: ' * * * the correctness of the judgment of the lower court is not to be determined by enquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found.'

U. S. ex rel Tisi v. Tod, 264 U. S. 131, 133, 44

S.Ct. 260, 68 L.Ed. 590. As we said in *Whitty v. Weedin*, 9 Cir., 68 F. (2d) 127, 130: 'The point to be determined by us is whether the appellant had a fair hearing, and, if it appears from the record that he had, we are not at liberty to disturb the decision of the lower court. The truth of the facts is for the determination of the immigration tribunals, and where its procedure and decision are not arbitrary or unreasonable, and the alien has had a fair hearing, the result must be accepted.' "

Del Castillo v. Carr, 100 F. (2d) 338 (C.C.A. 9) was decided December 14, 1938. This Court stated in part:

"It may be argued that these facts alone if shown at a legal and fair hearing would support the trial judge in dismissing the writ. In the first place, neither the trial judge nor the judges of this court are weighers of evidence in a proceeding of this kind. If there is any substantial evidence to support it the order of the Assistant Secretary of Labor cannot be nullified through the writ of habeas corpus. *Ng Fung Ho v. White*, 259 U.S. 276, 278, 42 S.Ct. 492, 66 L.Ed. 938; *Ex parte Wong Nung, Wong Nung vs. Carr*, 9 Cir., 30 F. (2d) 766. * * *"

In *United States ex rel Schlimmgen v. Jordan*, 164 F. (2d) 633 (C.C.A. 7), District Judge Lindley in delivering the opinion of the Court stated in part:

"Courts may not interfere with administrative determinations unless, upon the record, the proceedings were manifestly unfair, or substantial evidence to support the administrative finding is lacking, or error of law has been committed or

the evidence reflects manifest abuse of discretion. *Low Wah Suey v. Backus*, 225 U.S. 460, 32 S.Ct. 734, 56 L.Ed. 1165; *Kessler v. Strecker*, 307 U.S. 22, 59 S.Ct. 694, 83 L.Ed. 1082. Consequently, inasmuch as the party ordered deported can, in a habeas corpus proceeding, complain only of a failure of the administrative officer in one or more of these respects, the court acts upon the record made in the administrative hearing and may not try the issues de novo upon evidence not submitted in the first instance. *Kessler v. Strecker*, supra; *Ng Fung Ho v. White*, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938; *Lai To Hong v. Ebey*, 7 Cir., 25 F. (2d) 714. This results from the mandate of the statute, par. (a) Section 155, Title 8 U.S.C.A., reading: 'In every case where any person is ordered deported from the United States under the provisions of this Chapter, or of any law or treaty, the decision of the Attorney General shall be final'."

Mr. Justice Douglas when delivering the opinion of the Court in the case of *Bridges v. Wixon*, 65 S.Ct. 1443, 326 U.S. 135, 89 L.Ed. 2103 stated in part:

"In these habeas corpus proceedings the alien does not prove he had an unfair hearing merely by proving the decision to be wrong *(Tisi v. Tod*, 264 U.S. 131, 133, 44 S.Ct. 260, 68 L.Ed. 590) or by showing that incompetent evidence was admitted and considered. *Vajtauer v. Commisssioner* supra. 273 U.S. Page 106, 47 S.Ct. page 304, 71 L.Ed. 560. But the case is different where evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing which may be corrected on habeas corpus. See *Vajtauer v. Commissioner*, supra."

In the case of *Kessler v. Strecker*, 59 S.Ct. 694 307 U.S. 34, which was decided on April 17, 1939, Mr. Justice Roberts when delivering the opinion of the Court, stated in part:

> "The Circuit Court of Appeals remanded the case to the District Court for a trial de novo. In this we think there was error. The proceeding for deportation is administrative. If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements mentioned is lacking the proceeding is void and must be set aside. A district court cannot upon habeas corpus, proceed de novo, for the function of investigation and finding has not been conferred upon it but upon the Secretary of Labor. * * *"

In *Murdoch v. Clark*, (C.C.A. 1) 53 F. (2d) 155, decided November 3, 1931, the court held in part:

> "It is true that deportation without a fair hearing or unsupported by any evidence is a denial of due process, which may be corrected on habeas corpus. But want of due process is not established by showing merely that the decision was erroneous, or that incompetent evidence was received and considered. The proceedings in deportation hearings are of a summary nature, are not criminal, are not required to be conducted according to the usual proceedings in courts of law; nor conferred to the strict rules of evidence enforced in the courts.
>
> Upon a review on habeas corpus it is sufficient if there was some evidence from which the conclu-

> sion of the administrative tribunal could be deduced, and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial. *Tisi v. Tod*, 264 U.S. 131, 133, 44 S.Ct. 260, 68 L.Ed. 590; *U. S. ex rel Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106, 47 S.Ct. 302, 71 L.Ed. 560; *Low Wah Suey v. Backus*, 225 U.S. 460, 468; 32 S.Ct. 734, 56 L.Ed. 1165."

In the case of *Nakazo Matsuda et ux v. Burnett*, (68 F. (2d) 276), decided in the Ninth Circuit on December 22, 1933, Circuit Judge Garrecht in delivering the opinion of the Court stated:

> "The admission of any alien to the United States is subject to whatever condition the government sees fit to impose; the right to exclude or expel all aliens, or any class of aliens absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare. *Fong Yue Ting v. United States*, 149 U.S. 711 13 S.Ct. 1016, 1021, 37 L.Ed. 905."

Appellant's deportation to Canada has been ordered on the four grounds, to-wit: (1) that he entered without inspection; (2) that he entered the United States within one year from the date of exclusion and deportation, consent to reapply for admission not having been granted by proper authority; (3) that he was not in possession of a valid immigration visa and not exempted from the presentation

thereof; and (4) that he returned to or entered the United States, after having been excluded and deported, or arrested and deported in pursuance of the Act of October 16, 1918 (8 U.S.C. 137).

Entry without inspection is in itself sufficient ground to call for the issue of a warrant of deportation:

U. S. ex rel Natali v. Day, C.C.A. 2, 45 F. (2d) 112 (1930);

Wong Fat Shuen v. Nagle, C.C.A. 9, 7 F. (2d) 611 (1925);

Lidonnici et al v. Davis et al, 16 F. (2d) 532 (C. of A., D. of C. 1926, certiorari denied 274 U.S. 744 (1927));

Morini v. U. S., C.C.A. 9, 21 F. (2d) 1004, certiorari denied 48 S.Ct. 303.

After a criminal trial in the local District Court, Cause Number 45571, the appellant was convicted of illegally entering the United States on or about the 3rd of January, 1940, the entry upon which the deportation proceedings are based.

Appellant testified during the course of the hearing accorded him under the warrant of arrest in deportation proceedings on the 6th day of July, 1944, that at the time of his entry on the 3rd of January, 1940, it was his intention to reside in the United States.

The Court in *Del Castillo v. Carr* on December 14, 1938 (C.C.A. 9) 100 F. (2d) 338, stated in part:

> "The Immigration Law provides for inspection of every person applying for entry for an indeterminative period, and such person under the law is termed an immigrant."

In *U. S. ex rel Polymeris v. Trudell*, 53 S.Ct. 143, 284 U.S. 270, 76 L.Ed. 291, Mr. Justice Holmes who delivered the opinion of the Court stated in part:

> "The relators have no right to enter the United States unless it has been given to them by the United States. The burden of proof is upon them to show that they have the right. Immigration Act of 1924 No. 23, 43 Stat. 165 (U.S. Code Tit. 8, 221, 8 U.S.C.A. No. 221). By section 13 of the Act (8 U.S.C.A. 213) and the regulations under it, as remarked by the court below a returning alien cannot enter unless he has either an immigration visa or a return permit. The relators must show not only that they ought to be admitted but that the United States by the only voice authorized to express its will, has said so. * * *"

United States ex rel De Vita, C.C.A. 2, November 7, 1938, 99 F. (2d) 825, rehearing denied 1939, 59 S.Ct. 464, 306 U.S. 631, 83 L.Ed. 1033. Circuit Judge Chase when delivering the opinion of the court stated in part:

> "We will assume that the alien was returning in 1927 to an unrelinquished domicile in this country but, even so, he could not enter lawfully

unless he had either a reentry permit or an unexpired immigration visa. *United States v. Trudell*, 284 U.S. 279, 52 S.Ct. 143, 76 L.Ed. 291; Id. 2 Cir. 49 F. (2d) 730. Despite the fact of his previous lawful residence here, he was an alien immigrant within the definition of that term in Section 3 of the Immigration Act of 1924, 8 U.S.C.A. No. 203. *Karnuth v. United States*, 279 U.S. 231, 49 S.Ct. 274, 73 L.Ed. 677. He has failed to show that he was within any of the exceptions dispensing with his need for an immigration visa. It is immaterial that he might, perhaps, have secured a reentry permit which would have done away with the need of an immigration visa for he had no re-entry permit. Section 13(b) of the 1924 Act, (8 U.S.C.A. No. 213(b)), upon which he relies merely permits returning immigrants who have complied with the prescribed regulations to enter without immigration visa but this relator had not so complied."

The record is clear that the appellant was excluded from admission to the United States by a legally constituted Board of Special Inquiry on the 6th day of September, 1939, and one of the grounds of his exclusion was on the ground that "he was a member of and affiliated with an organization, association, society or group that believes in, advises, advocates, and teaches the overthrow by force and violence of the Government of the United States, and as a member of and affiliated with an organization, association, society or group that writes, circulates, distributes, prints, publishes, and displays, and

causes to be written, circulated, distributed, printed, published, and displayed, and that has in its possession for the purpose of circulation, distribution, publication, issue and display written and printed matter advising, advocating, and teaching the overthrow by force and violence of the Government of the United States under the Act of October 16, 1918 (8 U.S.C. 137).

An alien entering within one year after exclusion at Canadian border without leave to apply again for entry is subject to deportation.

United States ex rel Griefenbaun v. Day, D.C.E. D. N. Y. 49 F. (2d) 805 (1931), Section 17 of the Act of February 5, 1917 (8 U.S.C. 153) reads in part as follows:

> " * * * In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the Board of Special Inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General; * * *"

Although the appellant entered an appeal from the excluding decision of the Board of Special Inquiry, he abandoned the appeal by illegally entering the United States on the 3rd of January, 1940. The excluding decision therefore became final. Under the circumstances the decision of the Board of Special

Inquiry became final and the action is not subject to review. Moreover, it is believed that the decision of the Board of Special Inquiry was fair and supported by substantial evidence. It will be noted that there is nothing in the regulations which prohibit the use of ex parte statements in proceedings of this kind. The statements of the witnesses and of the petitioner himself were sufficient evidence to support the conclusion reached by the Board of Special Inquiry that petitioner was a member of the Communist Party of America and there is substantial evidence that the Communist Party was an organization that advocated and distributed literature advocating the overthrow of the Government by force or violence. Attention is also respectfully invited to the fact that at the commencement of the deportation hearing the counsel was given the opportunity to inspect the warrant and the evidence and was put in possession of all information necessary to enable him to prepare his defense. Attention is further respectfully called to the fact that at the request of the petitioner's counsel attempts were made to obtain for cross-examination, the three witnesses whose statements were considered by the Board of Special Inquiry in reaching its decision of the 6th of September, 1939. Mr. Deskins also was located and appeared for cross examination. Vekich and Clark were not available.

Judge Swan in *United States ex rel Ng Kee Wong v. Corsi* (C.C.A. 2) 65 F. (2d) 564 (1933) stated:

> "That the Board of Special Inquiry was entitled to take into consideration its prior departmental records is not questioned and could not be. *Tang Tun v. Edsell*, 223 U.S. 673, 681, 32 S.Ct. 359, 56 L.Ed. 606; *Moy Said Chung v. Tillinghast*, 21 F. (2d) 810, 811 (C.C.A. 1); *Ex parte Wong Foo Gwong*, 50 F. (2d) 360 (C.C.A. 9). The dispute is as to the effect to be given such records. If the Board were to proceed on strict common-law principles of evidence the prior record could be used merely to discredit the present testimony of Ng You Lon, leaving the testimony of the applicant and his putative father unimpeached. This is an artificial doctrine. Practically, men will often believe that if a witness has earlier sworn to the opposite of what he now swears to he was speaking the truth when he first testified. These administrative boards are not bound by common law rules of evidence, and we see no reason why they should not be permitted to accept a witness' prior testimony as affirmative proof of the fact then asserted, provided it is thought worthy of credence. Such was the effect given it in the cases of *Moy Said Ching* and *Wong Foo Gwon*, *supra*. See also *Johnson v. Kock Shing*, 3 F. (2d) 889 (C.C.A. 1); *Wong Wey v. Johnson*, 21 F. (2d) 963, 964 (C.C.A. 1); *Chen Toy v. Nagle*, 27 F. (2d) 513, 514 (C.C.A. 9). The appellee seeks to distinguish those authorities because in them the prior contradictory testimony was given by a member of the family of the applicant not by mere neighbor. That distinction goes only to the weight of the prior testimony, not to the applicability of the rule per-

mitting it to be considered as affirmative evidence of the fact stated."

In the case of *O'Connell ex rel Kwong Han Foo v. Ward*, decided by the Circuit Court of Appeals, First Circuit on March 10, 1942, 126 F. (2d) 615, Circuit Judge Woodbury who delivered the opinion of the Court stated in part:

> "It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were 'manifestly unfair,' were 'such as to prevent a fair investigation' or show 'manifest abuse' of the discretion committed to the executive officers by the statute *Low Wah Suey v. Backus*, 225 U.S. 460, 472, 32 S.Ct. 734, 56 L.Ed. 1165, or that 'their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of the due process of law,' *Tang Tun v. Edsell*, 223 U.S. 673, 681, 682, 32 S.Ct. 359, 363, 56 L.Ed. 606. The decision must be after a hearing in good faith, however summary, *Chin Yow v. United States*, 208 U.S. 8, 12, 28 S.Ct. 201, 52 L.Ed. 3, 369, and it must find adequate support in the evidence, *Zakonwaite v. Wolf*, 226 U.S. 272, 274, 33 S.Ct. 31, 57 L.Ed. 218." *Kwock Jan Fat v. White*, 253 U.S. 454, 457, 40 S.Ct. 566, 567, 64 L.Ed. 1010.
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> "Since the denial of a fair hearing before the Board cannot be established by merely showing that the decision of the Board was wrong, *(Chin Yow v. United States*, 208 U.S. 8, 13, 28 S.Ct. 201, 52 L.Ed. 369), the District Court is without jurisdiction to consider the merits of cases

like the present until it has been established to that court's satisfaction that the applicant had not been given 'a hearing properly so called' by the Board. *Chin Yow v. United States, supra; Wong Wey v. Johnson*, 1 Cir. 21 F. (2d) 963; Id. 1 Cir. 23 F. (2d) 326, certiorari denied 277 U.S. 592, 48 S.Ct. 528, 72 L.Ed. 1004. * * *"

In the case of *Masemichi Ikeda v. Burnett*, C.C.A. 9, 68 F. (2d) 276, decided on December 13, 1933, Circuit Judge Wilbur stated in part:

"Appellant also objected to the use of the immigration file of the proceedings for deportation of Masahara Sata and the reading of the part of the testimony of Masahara Sata therefrom into the record in this case. It is well settled that the immigration authorities may consider testimony contained in their official files and are not bound by strict rules of evidence in deportation proceedings. *Lum Tse Chew v. Nagle* (C.C.A.) 15 F. (2d) 636; *Yee Chun v. Nagle* (C.C.A.) 35 F. (2d) 839; *Ex parte Keizo Kamiyama* (C.C.A.) 44 F. (2d) 503; *Ex parte Susuki Fukumoto* (C.C.A.) 53 F. (2d) 618."

In *U. S. ex rel Doukas v. Wiley* (C.C.A.) 160 F. (2d) 92, decided February 7, 1947, the Court said:

"It is also well settled that the officer conducting the proceedings is not bound to observe the strict rules of evidence as enforced by judicial tribunals and that the improper admission of evidence is not a ground for reversal of the executive finding if the admission of that evidence has not resulted in a denial of justice. *Bilokumsky v. Tod*, 263 U.S. 149; 44 S.Ct. 54, 68 L.Ed. 221 and *Tang Tung v. Edsell*, 223 U.S. 673, 32 S.Ct. 359, 56 L.Ed. 606."

In re *Giacobbi*, District Court, N.D. New York, July 27, 1939, 32 F. Supp. 508 (affirmed *United States ex rel Salvatore Giacobbi, Appellant v. J. Arthur Fluckey, Director of Immigration, Appellee* (C.C.A. 7), March 25, 1940, 111 F. (2d) 297, it is stated in part:

> "It has been held that deportation proceedings were not unfair even though the alien was denied opportunity for cross-examination of certain witnesses. *Coranica v. Nagle*, 9 Cir. 23 F. (2d) 545, certiorari denied 277 U.S. 589, 48 S.Ct. 437, 72 L.Ed. 1002."

Having further reference to the admissibility it is believed that the dissenting opinion of the Supreme Court in the case of *Bridges v. Wixon*, 65 S.Ct. 1443, 326 U.S. 176, is applicable to the present case. Chief Justice Stone in delivering the dissenting opinion stated in part:

> "And no principle of law has been better settled than that the technical rule for the exclusion of evidence, applicable in trials in courts, particularly the hearsay rule, need not be followed in deportation proceedings. *Bilokumsky v. Tod*, supra, 263 U.S. 149, 153, 44 S.Ct. 54, 55, 68 L.Ed. 221 and cases cited: *Tisi v. Tod*, supra, 264 U.S. 133, 44 S.Ct. 260, 68 L.Ed. 590; *Vajtauer v. Commissioner of Immigration*, supra, 273 U.S. 106, 47 S.Ct. 304, 71 L.Ed. 560, more than in other administrative proceedings.
>
> With increasing frequency this Court is called upon to apply the rule, which it has followed for

many years, in deportation cases as well as in other reviews of administrative proceedings, that when there is evidence more than a scintilla, and not unbelievable on its face, it is for the administrative officer to determine its credibility and weight. *Merchant's Warehouse Co. v. United States*, 283 U.S. 501, 508, 51 S.Ct. 505, 508, 75 L.Ed. 1227; *Federal Trade Commission v. Education Society*, 302 U.S. 112, 117, 58 S.Ct. 113, 115, 82 L.Ed. 15, 141; *Consolidated Edison Co. v. Labor Board*, supra, 305 U.S. 229, 59 S.Ct. 216, 83 L.Ed. 126; *National Labor Relations Board v. Nevada Copper Co.*, 316 U.S. 195, 62 S.Ct. 960, 86 L.Ed. 1305; *Marshal v. Platz*, 317 U.S. 383, 388, 63 S.Ct. 284, 286, 87 L.Ed. 348; *National Labor Relations Board v. Southern Bell Co.*, 319 U.S. 50, 60, 63 S.Ct. 905, 910, 87 L.Ed. 1250; *Mido Corp. v. Labor Board*, 321 U.S. 678, 681, 682, 64 S.Ct. 830, 831, 832, 88 L.Ed. 1007. We cannot rightly reject the administrative finding here and accept, as we do almost each week particularly in our denials of certiorari, the findings of administrative agencies, which rest on the tenuous support of evidence far less persuasive than the present record presents."

CONCLUSION

There has been no misapplication or misconstruction of law or showing that the appellant has been unduly detained and restrained of his liberty, nor was the action of the Attorney General or his authorized representative in issuing the warrant of deportation arbitrary, capricious or in contravention of any rule of law; hence, it is final.

The petition for the writ of habeas corpus was properly denied by the District Court and its judgment should be affirmed.

Respectfully submitted,

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